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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 359

EDWARD C. SODERBERG, JOHN J. KISSANE AND
WILLARD B. HOWELL, PETITIONERS

v.

S. BIRCH & SONS CONSTRUCTION CO. AND MORRI-
SON-KNUDSEN CO.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Washington, Northern Division (R. 611-618) is not officially reported. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 633-642) is reported at 163 F. 2d 37.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered on July 9,

1947 (R. 643). The petition for certiorari was filed on September 22, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioners and their assignors, employed as clerks, typists, timekeepers, warehousemen and expediters by a Government contractor engaged in the construction of fortifications on Aleutian island bases were "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent part of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 29 U. S. C. 201, *et seq.*) provides as follows:

SEC. 7 (a). No employer shall, * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *

(3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This action was originally brought by petitioners on their own behalf, and, as assignees of their causes of action, on behalf of eighty-two former fellow employees of respondents, to recover overtime compensation, liquidated damages, and counsel fees under the provisions of the Fair Labor Standards Act, *supra* (R. 2-158, 183).¹ The complaint was in eighty-five counts (R. 2-158). It alleged that respondents were engaged in the purchasing and using, selling and furnishing of materials, equipment and supplies in interstate commerce; that petitioners and their assignors, employees of respondents, performed duties constituting an essential part of the handling and the buying, selling and transporting of respondents' goods in interstate commerce; that the performance of such duties constituted "engaging in commerce" within the meaning of the Fair Labor Standards Act; and that respondents had failed to compensate them for hours worked in excess of forty hours per week as provided for in the Act (R. 3-6). The trial court, having found that only certain of the claimants had been "engaged in commerce" within the meaning of the Act (R. 203-207), entered judgment granting in part the relief sought (R. 217) and dismissing

¹ This is a companion case to *F. J. Englert v. S. Birch & Sons Construction Co., et al.*, now on petition for a writ of certiorari, No. 358, at this Term.

the other claims (R. 214-216).² On appeal, the court below affirmed (R. 643).³

The facts which gave rise to this cause of action are briefly summarized as follows:

As a defense measure, the United States, during the past war, undertook to fortify certain of the

² The trial court found claimant in count 16, who acted as camp postmaster, to have been "engaged in commerce or in the production of goods for commerce" within the meaning of the Act, and that he had been employed in excess of 40 hours per week without overtime compensation (R. 203-204). Accordingly, it entered judgment in his favor (R. 217). The trial court further found that claimants in counts 1, 2, and 18, while employed in Seattle, Washington, and claimants in counts 8 and 9, while employed in the camp post office, had been "engaged in commerce or in the production of goods for commerce" within the meaning of the Act (R. 204-207), and entered judgment in their favor for such periods (R. 217). These portions of the judgment were not questioned on appeal (R. 620, 636) and are not in issue here.

At the trial, counts 51, 74, and 81 were dismissed on petitioners' motion (R. 633). The other claims dismissed were those asserted in counts 3-7, 10-15, 17, 19-50, 52-73, 75-80, and 82-85 (R. 209-211, 634).

³ On appeal, counts 6, 9, 11, 14, 41-50, 53-56, 69, 70, 72, 73, 75, 78, and 85 were dismissed on petitioners' motion (R. 624-625) and the court considered only counts 1-5, 7, 8, 10, 12, 13, 15, 17-40, 57-68, 71, 76, 77, 79, 80, and 82-84 (R. 634).

The petition herein states that it seeks review by this Court of the claims of petitioners and 26 former employees of respondents (Pet. 2). It then lists 25 claims in which relief is sought (Pet. 2-3, n. 1). The Government assumes that petitioners seek relief in a total of 26 claims, and that the claim of Kissane in count 1 was inadvertently omitted from those listed.

Aleutian islands (R. 178-179, 183, 637).⁴ To this end the Government instituted various construction projects whereby essential fortifications and improvements were to be erected on the islands under the direction of the Army Engineers (R. 179, 183-184, 637). Respondents, as joint venturers (R. 184), obtained three construction contracts from the Government. These contracts, designated as contracts 500, 501 and 502, provided in general for the mixing, delivering and placing of asphaltic concrete and asphaltic seal coat on three of the islands (R. 179, 184, 637). They specified that all work would be done under the direction of the Army Engineers, and required respondents to furnish the necessary labor, to perform engineering, laboratory and inspection work, and to supply crews to operate mess halls and quarters (R. 179-180, 184-185, 637-638). Building equipment and rations were furnished by the Government (R. 180, 185, 638).⁵

Respondents' projects required approximately 270,000,000 pounds of materials, supplies, and equipment (R. 180, 185, 638). Of this total ton-

⁴ The names of the island have been withheld at the request of the Army, but the islands were owned by the United States and under complete occupation and control by the Army (R. 179).

⁵ Pursuant to the terms of respondents' contract the United States is, or may be obligated to reimburse the contractors for money paid in resisting or settling claims arising out of work performed thereunder. Defense of this action was undertaken by the Department of Justice at the request of the War Department.

nage, approximately 94 percent. was procured by the Government* and the remaining 6 percent., including repair parts and merchandise intended for resale in Alaska, was procured by respondents' Seattle, Washington, office from various vendors in the United States (R. 180, 185, 638).⁷ The majority of respondents' purchases, including all resale merchandise, were delivered in Seattle by rail or truck directly to either Government operated or commercial crating plants, where it was processed for overseas shipment and transhipped by the Government to the Resident Engineer, U. S. Army, in the islands in question, without cost to respondents (R. 181, 185-186, 639). Upon the arrival of a shipload of goods at the projects, the entire handling of all cargo was accomplished by Army personnel without regard to type (R. 181, 186, 639). When needed, supplies and subsistence stores required for mess halls and quar-

* Procurement of approximately 90 percent of the materials, supplies, and equipment used in the over-all construction of the projects was effected directly by the Government from various stateside manufacturers and shipped to the projects by Government-furnished transportation (R. 180, 185, 638).

⁷ In the purchase of all materials, supplies, and goods, title to the items passed directly to the Government from the vendor. The respondents never, at any time, owned or had title to the purchased materials or merchandise. Shipments from the vendor's place of business to Seattle were by Government bill of lading after inspection and acceptance by the Government at the point of origin, unless the vendor shipped the merchandise f. o. b. Seattle and retained title to such point of delivery (R. 180, 185, 638).

ters were procured at the site of the project from the United States Army Quartermaster Corps (R. 186).

Cargoes of materials, supplies and equipment arriving at the islands were discharged at a Government dock by Army personnel under Army supervision (R. 181, 186, 639). Such goods were thereafter transferred under the direction of the Army by Army personnel to a sorting or classification yard, maintained and operated by the Army and located approximately one-half mile from the dock, where they were sorted and loaded on Government trucks⁸ (R. 181, 186-187, 639). The entire handling of all such cargo was accomplished by Army personnel, although the contractors employed two of the claimants herein at the sorting yard as expediters to claim the goods intended for their companies' projects (R. 181, 187, 639).⁹

⁸ Asphalt and fuel oil were unloaded from government vessels, and were hauled by Army personnel to stock piles or dumps located at advantageous points where they were drawn upon by respondents' employees as required (R. 191).

⁹ Respondents employed Scheid, claimant in count 18 and Robinson, claimant in count 68, as expediters (R. 187). Claimant Robinson was first employed as a clerk in the resale commissary store. He was transferred to the job as expeditor on August 4, 1944, and was so employed until December 30, 1944. (R. 187, 488-491.) It was shown that Robinson worked at the sorting yard on an average of three days a month (R. 492). Claimant Scheid was first employed as an expeditor in respondents' Seattle office (R. 496-497). He has been awarded judgment for overtime compensation while so employed (R. 217) and that portion of his claim is

From the sorting yard the goods were transported by Government truck¹⁰ to the several Government warehouses occupied by respondents at each of the projects (R. 187-188). Specific types of materials, supplies and equipment needed for construction were redistributed from the central warehouse at each project¹¹ to other warehouses for storage and issuance as needed (R. 188). The claimants herein, who were employed at these central warehouses, performed the mixed duties of clerks and warehousemen (R. 188-190). These duties consisted of tallying or listing goods received, transferred or issued; stowing goods; maintaining perpetual inventories; and submitting reports of goods received to the office

not now in issue (R. 620). He testified that while in the islands he had worked as an expeditor from August 1944 to November 1944 during which time 20 vessels discharged (R. 500) and that at one time he found three boxes of merchandise that had been mislaid (R. 499).

¹⁰ These trucks were operated by Army personnel or respondents' employees (R. 187). No claim is here made (Pet. 4-7), and the courts below did not find, that any of the claimants herein had been engaged as truck drivers.

¹¹ On Project 500, materials, supplies, and equipment needed for construction purposes were taken direct to the "materials and supplies" warehouse and supplies designated as resale goods were taken direct to the "resale goods" warehouse (R. 187). On Project 502, all materials, including "resale goods", were taken first to the "materials and supplies" warehouse (R. 187-188). On both projects, the "materials and supplies" warehouses were the central warehouses for the storage of the general materials, supplies, and equipment needed for construction purposes (R. 188).

manager located at the project sites (R. 188). The personnel so employed performed no duties in connection with the ordering of materials, supplies or equipment or in the transportation of goods in interstate commerce (R. 188, 641).¹²

Under their contract,¹³ respondents operated for the Government, at each project site, a com-

¹² Claimant Howell was supervisor of the "materials and supplies warehouse" at Project 502 (R. 189, 388). It was shown that he had no connection with any merchandise until it arrived at the warehouse at the job site (R. 399-401). Claimant Stewart, an inventory and tally clerk in the "materials and supplies" warehouse at Project 502 (R. 189, 459), had no contact with the goods until after their arrival at the warehouse (R. 461-463). Claimant Mayfield had no other duties than that of perpetual inventory clerk (R. 189, 557-558). Claimant Showalter merely kept the record of receipts and disbursements of goods (R. 189-190, 455) and had no connection with their shipment or transportation (R. 456). Claimant Stockemer was employed merely as a receiving clerk (R. 190, 482, 486). Claimants Cox and Brown, records clerks, had no contacts with the goods except at the warehouse (R. 190, 529, 530, 327). Claimant Krampert, employed as a clerk, and claimants Kouns and Buchanan, clerk-typists, had no connection with the transportation of goods (R. 190, 475, 531-533), nor did claimants Taylor, Wilcox, and Sinema who were employed as clerks (R. 189, 190, 561-563). Smith, claimant in count 80, a clerk in the automotive repair shop warehouse, merely drew supplies from the central warehouse (R. 190, 495).

¹³ Under the contracts, respondents were also required to operate and supervise the camps at the project sites, and the housing and mess facilities for employees (R. 198). This work was performed under the supervision of a camp manager (R. 198). The only claimant herein who was employed at a camp is claimant Ferrell (see n. 17, *infra*, p. 12) who performed clerical duties in the camp manager's office (R. 199).

missary or "resale" stores, where retail goods were sold to the various personnel in the islands irrespective of whether or not they were respondents' employees.¹⁴ (R. 191, 640). Separate warehousing was maintained for the storage of supplies sold in these stores which were designated as "resale goods" warehouses (R. 191). The duties of the personnel employed in these "resale" stores and "resale goods" warehouses consisted of making retail sales and of keeping records of the transfer of supplies to the "resale goods" warehouses and from such warehouses to the "resale" stores (R. 191-192). These personnel did not perform any duties in connection with the ordering or transporting in interstate commerce of the commissary supplies to the project site.¹⁵

¹⁴ There was a 15% to 40% mark-up in the price of goods over the cost to the Government. Receipts from retail sales were accounted for to the Resident Engineer, and the profits realized accrued to the Government. Title to the goods sold in the commissary was in the Government at all times. (R. 191.)

¹⁵ The following claimants herein were employed in the resale goods warehouses and commissary stores: Soderberg, count 2; Hazelberg, count 7; Ferrell, count 8; Lindgren, count 10; Showalter, count 22; Strini, count 17; Downs, count 33; Roach, count 61; Ayres, count 67; Robinson, count 68; and Law, count 77 (R. 192-194). Claimant Soderberg has been awarded judgment for overtime compensation for his employment in respondents' Seattle office (R. 217) and that portion of his claim is not now in issue (R. 620). Claimant Ferrell has been awarded judgment for overtime compensation for his employment at respondents' "Camp Post Office" (R. 204-205, 217) and that portion of his claim

Respondents maintained general construction offices at the project sites under the general direction and supervision of an office manager and project manager (R. 194). Personnel employed here included clerks, typists, timekeepers and pay-roll clerks (R. 194).¹⁶ The trial court found

is not now in issue (R. 620). Soderberg, who was store-keeper in charge of the resale goods warehouse at Project 502 (R. 192), testified that he had nothing to do with the purchase of or the transportation of resale goods to the islands (R. 372) and that neither he nor any of the men who worked under him had any contact with the goods until after they had reached the island (R. 379). He testified that he had made two shipments of goods to other islands in the Aleutian chain (R. 383). Ferrell was employed at the resale goods warehouse for 30 days in the capacity of night watchman (R. 548-549). Claimants Hazelberg, Roach, Strini, and Downs were employed as clerks in the resale goods warehouse at Project 502 (R. 193). Claimant Ayres was employed as a warehouse clerk at Project 500 (R. 193) and testified that he had nothing to do with the goods until after they had arrived at the warehouse (R. 250, 252-253). Claimant Lindgren was employed as manager of the resale store at Project 502 (R. 193) and merely drew goods from the resale goods warehouse (R. 553). Claimant Showalter, who had also been employed at the materials and supplies warehouse at Project 502 (see n. 12, *supra*, p. 9) made over-the-counter sales at the resale store at Project 502 (R. 193, 449). Claimant Robinson, who had also been employed as an expeditor (see n. 9, *supra*, pp. 7-8) and claimant Law, were employed as sales clerks at the Project 500 resale goods store (R. 194).

¹⁶ After payment, certified copies of the pay rolls were transmitted to respondents' Seattle office. The timekeepers and pay-roll clerks had no part in forwarding these copies to Seattle. (R. 194-195.)

that none of these personnel were engaged in interstate commerce (R. 195, 641).¹⁷

ARGUMENT

The sole question presented is whether the claimants herein were “* * * engaged in commerce * * *” within the meaning of the Fair Labor Standards Act. Both courts below held that petitioner had failed to show that their duties were closely enough related to interstate commerce to be a part thereof and that, accordingly, they were not within the coverage of the Act.¹⁸ We submit that the decisions below are correct and that, contrary to petitioners’ sugges-

¹⁷ Prior to his employment in Alaska, petitioner Kissane had been employer in respondents’ Seattle office (R. 205-206). He had been awarded judgment for overtime compensation while so employed (R. 217) and that portion of his claim is not now in issue (R. 620). In Alaska, Kissane was employed at Project 502 as an auditor (June 1, 1944, to September 16, 1944) and as chief timekeeper (September 16, 1944, to December 20, 1944) (R. 195). As an auditor, he made sales analyses of the resale goods store sales (R. 195). As chief timekeeper, he supervised the work of timekeepers, assigned their duties, checked time reports and was generally responsible for the efficient conduct of the time office (R. 195). Claimant Ferrell (see n. 13, *supra*, p. 9), was employed in the general office for approximately six weeks in the capacity of clerk typist (R. 195-196). Claimant Kouns (see n. 12, *supra*, p. 9), was employed as a general clerk and typist for approximately two months (R. 197).

¹⁸ As noted throughout our statement of the case, some of the claimants herein, in certain aspects of their duties, were considered by the courts below to have been within the coverage of the statute and were given judgment to that extent (R. 216, 620). Such claims are not involved herein.

tion (Pet. 12-15), there is no conflict with the decisions of this Court.

1. Petitioners urge that a reversal of the judgment below is compelled by *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 (Pet. 12). They argue that the interstate movement of the goods involved did not end until their arrival at the commissary or "resale" stores or at the construction site (Pet. 12); and they assert that they performed duties in connection with such movements prior to those points (Pet. 12). In support of this argument, they cite a ruling by the Administrator of the Wage and Hour Division, [1947] WH Man. pp. 9-10, to the effect that warehouse personnel checking out-of-state movements of goods on an unloading platform and removing them to the interior of the warehouse are within the coverage of the Act (Pet. 13).

The vice of petitioners' argument is clear. Unlike the situation presented in the *Jacksonville Paper Co.* case, the respondents herein were not mere intermediaries in the movement of goods from the manufacturers to a particular customer. 317 U. S. at 566.¹⁹ They were engaged in new and original construction at the ultimate des-

¹⁹ In the *Jacksonville Paper Co.* case, this Court was dealing with employees of the wholesaling industry, the medium through which large-scale sources of supply meet a nationwide demand. The Government urged that the warehouse employees of a wholesaler were within the coverage of the Act. It was pointed out that the economic function of the wholesaler was to make available to his trade the products

tination of the goods, an Alaskan Army base, a purely local activity (R. 612) under the direction of the Army Engineers (R. 179, 184, 612, 637-638). It has been uniformly held that local construction employees are not within the coverage of the Act (*Cohen, et al. v. Cauldwell Wingate Co.*, 296 N. Y. 776, certiorari denied on October 20, 1947, No. 255, this Term, and cases cited at page 6 of the Brief in Opposition filed in that case), a judicial view entirely consistent with an official interpretation of the statute by the Administrator of the Wage and Hour Division. Interpretative Bulletin No. 5, Paragraph 12 ([1944-1945] Wage and Hour Manual 23).

Thus, the essential problem presented by a coverage case under the Act, that of "drawing lines" (*Kirschbaum Co. v. Walling*, 316 U. S. 517, 523; *10 East 40th St. Co. v. Callus*, 325 U. S. 578, 584), has been fully explored in so far as the needs of this case are concerned. Nor can it here be successfully contended that the judgments below did not result from full inquiry into the "**** special facts pertaining to the particular business." *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 572. See *Overstreet v. North Shore Corp.*, 318 U. S. 125, 128. *Warren-Bradshaw Co. v. Hall*, 317 U. S. 88, 90. Accordingly, we submit

of widely scattered factories, mines, farms, and forests, and that his warehouse was a machine for the movement of goods rather than as a space for storing merchandise (Government's Brief, pp. 13-14).

that claimants' duties, at best remotely connected with any "channels of interstate commerce" (*McLeod v. Threlkeld*, 319 U. S. 491, 494), were not concerned with the movement of materials or personnel in interstate commerce within the meaning of the statute and that the judgments below were correct (R. 182-217, 612, 640-641).

2. Even assuming, *arguendo*, as petitioners apparently contend, that the *Jacksonville Paper Co.* case applies to local new construction projects as well as to commercial wholesale warehouses, it is clear that petitioners may not succeed herein. Here, there was no mere "ritual" of placing the goods in respondents' warehouses to defeat the purposes of the Act. 317 U. S. at 568. Title to all of the goods involved was in the Government (R. 180-181, 185, 638). Such goods were consigned to and shipped directly to the Resident Engineer, U. S. Army (R. 181, 186, 639) and, upon arrival in the islands, were delivered by the Army, or by certain of respondents' employees not involved in the instant action (see pp. 6-7, *supra*), to respondents' warehouses (R. 181, 186-188, 639). It was at this point that the continuity of movement and the interstate character of the shipments ended, since respondents were the ultimate consignees. The warehouse was an integral part of the project to which the goods were destined, not an intermediate stopping place. *Walling v. Jacksonville Paper Co.*, 317

U. S. at 568; cf. *Higgins v. Carr Bros Co.*, 317 U. S. 572. No work was performed by 24 of the 26 claimants herein until subsequent to the arrival of the goods at the central warehouse (see pp. 8-11, *supra*) and such claimants clearly could not be considered as having been "engaged in commerce" within the meaning of the Act.²⁰

3. Petitioners urge as error that the court below did not reiterate the detailed findings of the district court, and, further, that the court below examined the testimony and stipulations in the record "which were never collected by either counsel for review * * *" (Pet. 11). It is difficult to see the direction of this argument. The court below affirmed the district court judgment and, in so doing, did not diverge from the district court's findings in any material respect. The findings of the trial court closely parallel the facts stipulated by the parties and are fully supported by the testimony. We cannot see that there are thus presented any "procedural prob-

²⁰ With respect to the question whether the two expediters, Robinson (count 68) and Scheid (count 18), who assisted Army personnel in "claiming" the goods at the classification yard, were employed in the "channels of interstate commerce," the record does not disclose that they assisted in the unloading of incoming vessels, handled any goods, or did more than identify the goods at the classification yard. We submit that, at best, they were only remotely connected with the stream of commerce (*McLeod v. Threlkeld*, 319 U. S. 491, 494), and that no question warranting certiorari is presented by their claims.

lems" (Pet. 11) or any basis for urging that the court below erred in affirming the trial court's conclusion.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted.

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